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April 28, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Salas:

I have enclosed the original and four copies of the Reply Comments of RCN Telecom Services, Inc. in the above-referenced proceeding. These reply comments were filed through the Commission's Electronic Comment Filing System yesterday evening.

If you have any additional questions regarding these Reply Comments, please do not hesitate to contact me.

Sincerely,

Michael W. Fleming

Michael W. Fleming

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	
Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

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Dated: April 27, 1999

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SUMMARY

The comments filed in this proceeding demonstrate three things: first, carriers (usually, competitive local exchange carriers ("CLECs")) that deliver traffic to Internet service providers ("ISPs") should be compensated for the services they provide to carriers that serve ISP subscribers; second, the issue most troubling to incumbent local exchange carriers ("ILECs") and state commissions is not whether CLECs should be compensated, but how those compensation payments should be recovered; and third, and most importantly, the Commission has needlessly complicated this issue by taking it out of the context of local competition and by providing dicta that compensation for traffic to ISPs is not within the scope of Section 251(b)(5) of the Telecommunications Act.

By revisiting its earlier decision and determining that this traffic, consistent with the language of the Act, is within the scope of Section 251(b)(5), a host of problems would be resolved. The Commission then could establish reciprocal compensation rules applicable to all traffic, including ISP-bound traffic, and states undoubtedly would have the authority to administer the rule. The negotiation and arbitration requirements of Section 251 and 252 would clearly apply to ISP-bound traffic (even though RCN contends that Sections 251 and 252 already apply to this traffic).

In the alternative, the Commission should adopt a variation on RCN's initial proposal. Under that variation, the Commission would establish a federal rule under Section 201 that the inter-carrier compensation rate for jurisdictionally interstate ISP-bound traffic shall be the same as the rate for jurisdictionally intrastate traffic. The intrastate compensation rate would be set by state commissions under their intrastate authority, and rate would be the same as the existing reciprocal compensation rate for all other local traffic.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, hereby submits its Reply comments pursuant to the Notice of Proposed Rulemaking issued February 26, 1999.[1] The comments filed in this proceeding demonstrate three things: first, carriers (usually, competitive local exchange carriers ("CLECs")) that deliver traffic to Internet service providers ("ISPs") should be compensated for the services they provide to carriers that serve ISP subscribers; second, the issue most troubling to incumbent local exchange carriers ("ILECs") and state commissions is not whether CLECs should be compensated, but how those compensation payments should be recovered; and third, and most importantly, the Commission has needlessly complicated this issue by taking it out of the context of local competition and by providing dicta that compensation for traffic to ISPs is not within the scope of Section 251(b)(5) of the Telecommunications Act. These reply comments will address each of these points, and will also provide a variation on RCN's initial proposal for a federal system for inter-carrier compensation for ISP-bound traffic.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68 (rel. Feb. 26, 1999) ("Declaratory Ruling" or "NPRM").

I. CLECS SHOULD BE COMPENSATED FOR TRAFFIC TO ISPS BY ILECS

The Commenters generally agree that CLECs should be compensated for delivering traffic to ISPs.[2] The differences among the parties, of course, are based on who should pay the CLECs. The ILECs believe, in essence, that CLECs are providing a service to ISPs, and CLECs should recover their costs from the ISPs they serve. In fact, CLECs are providing a service for ILECs and ILEC customers by providing transport and termination of telecommunications originated by ILEC customers that the ILEC would be required to provide but for the presence of the CLEC. Therefore, as with all other local exchange traffic, the ILEC should compensate the CLEC for the services provided by the CLEC.

Any other result would be extremely unfair to CLECs. A compensation system in which the CLEC must collect from its own customer the costs of transporting and terminating traffic originated by an ILEC customer is substantively the same as a bill-and-keep arrangement. Bill-and-keep was requested, generally, by CLECs, and was rejected, unanimously, by the ILECs. The reason for ILECs rejecting bill-and-keep was a conscious business decision based on an assumption by the ILECs that they would receive more in reciprocal compensation from CLECs than they would pay to CLECs. That business decision turned out to be wrong. Imposing bill-and-keep on CLECs now (after they adjusted business plans when bill-and-keep was denied to them) would be improper

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[2]As stated above, in the current context of inter-carrier compensation for ISP-bound traffic, usually the carrier delivering the call to the ISP is a CLEC, and the call is originated by a customer of an ILEC. Therefore, the dispute is framed largely in terms of payments from the ILECs to the CLECs. References to this payment arrangement may be used for clarity and simplification in these Reply Comments, but this arrangement is not static and will no doubt change as CLECs overcome the barriers to entry to local markets erected by ILECs and serve more residential and business customers that use dial-up services to reach their ISPs. RCN, for example, is already a facilities-based provider of local exchange service to residential customers.

regulatory interference with market dynamics and an unwarranted rescue of the ILECs from a faulty business decision.[3] This approach is manifestly unreasonable when applied to only one segment of traffic as the ILECs propose.

II. HOW ILECS RECOVER COMPENSATION PAYMENTS IS A SEPARATE MATTER

What appears to trouble ILECs the most by a system of compensation to CLECs (setting aside for now the ILEC reaction to the mere presence of CLECs in their monopoly markets to which they must pay money) is their allegation that reciprocal compensation payments outstrip the revenues ILECs receive from their end users that place calls to ISPs.[4] The argument, of course, doesn't bear the weight heaped on it by the ILECs: any end user compensation structure where all end users pay roughly the same monthly charges to the ILEC will have some customers that generate more costs than revenues, offset by others that generate more revenues than costs.[5] And this argument does not even take into account the myriad other sources of revenue for the ILEC generated by dial-up access to the Internet: additional lines, vertical features, voice mail services, and others.

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[3]*See* Comments of RCN Telecom Services, Inc., at 11-12, describing a TR Daily article quoting Commissioner Powell as saying that telephone companies want the Commission to rescue them from the consequences of their earlier decisions.

[4]Ameritech Comments at 9; GTE Comments at 7.

[5]Even if the ILECs' rates and revenues did not cover their payments to CLECs, the ILECs do not propose a compensation rate that would fit within their rates and revenues. One would expect that if Ameritech were losing 3 cents per call by paying a CLEC 10 cents in inter-carrier compensation, Ameritech would offer to pay 7 cents to the CLEC rather than 10 cents. Instead, Ameritech offers 0 cents. The anticompetitive nature of the ILEC position couldn't be more obvious.

The ILECs also fail to mention that they all have ISPs of their own. If inter-carrier compensation represents costs that would otherwise be borne by the ILEC (and if it doesn't, then the rate set using the ILEC cost studies is too high), the cost of dial-up access from an ILEC end user to the ILEC ISP is the same as the cost to an ISP served by a CLEC. If the ILEC end user rate structure did not support dial-up access to ISPs, the difference between the costs and the revenues for dial-up access is being borne by the ILEC's captive ratepayers. If this were the case, the ILEC would be engaging in an unlawful exploitation of its ratepayers paying regulated rates in order for the ILEC to provide a competitive ISP service. While it may be rational to permit its regulated ratepayers to subsidize the provision of ISP service (because the revenues from ISP service may exceed the hypothetical subsidy paid by its ratepayers), it would not be lawful. The fact that each ILEC does have its own ISP indicates that the rate structure supports service to ISPs, and the ILEC argument falls flat.

Nevertheless, the ILECs propose generating additional revenues to offset their inter-carrier compensation payments to CLECs. They propose imposing a surcharge on ISPs,[6] access charges on CLECs,[7] and sharing the revenue paid by an ISP to a CLEC.[8] Oddly, while it is the ILEC view that somebody must pay the ILEC, only SBC proposes imposing a charge on its own end users that are making these calls to ISPs.[9]

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[6]SBC Comments at 23.

[7]*Id.*

[8]US West Comments at 3; BellSouth Comments at 9.

[9]SBC Comments at 23.

The states have a similar problem with a federal inter-carrier compensation system. If this traffic is largely interstate traffic, the states feel that costs related to its provision should not be recovered through intrastate rates.[10] For this reason, they have asked that, for purposes of separations, the Commission include the costs and the revenues for Internet access traffic in the interstate jurisdiction.

Both of these issues are important, and they are related, but they are not the subject of this proceeding. This proceeding is focused on a system of compensation to carriers that deliver calls to ISPs. The Commission has already ruled that recovery of such costs is within the intrastate jurisdiction, and that ILECs should present their cases to state regulators if Internet access imposes uncompensated costs on carriers.[11] Because the Commission has already established a mechanism for recovery of ILEC costs related to ISP traffic, but has not yet established a mechanism for inter-carrier compensation for ISP-bound traffic, the compensation issue must be resolved first without the delay associated with modifying the existing separations and ILEC cost recovery issues. Those matters should be considered in a separate proceeding.

III. THE COMMENTS ILLUMINATE CERTAIN ERRORS IN THE DECLARATORY RULING

The most important aspect of the comments is that they point out the implications of the Commission's conclusion in the Declaratory Ruling that inter-carrier compensation for ISP-bound traffic is not within the scope of Section 251(b)(5). As RCN stated in its initial comments, RCN

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[10]Vermont Public Service Board Comments at 12; Florida Public Service Commission Comments at 9-10; Indiana Utility Regulatory Commission Comments at 6.

[11]*In re Access Charge Reform,* First Report & Order, 12 FCC Rcd. 15982, ¶ 346, *aff'd, Southwestern Bell Telephone Co. v. FCC,* 1998 WL 485387 (8th Cir., Aug. 19, 1998).

disagrees with the Commission on this conclusion.[12] Section 251(b)(5) is not limited on its face to jurisdictionally local traffic; any such limitations were imposed by the Commission in the *Local Competition Order* on the basis that other forms of inter-carrier compensation were covered by its access charge regime. What is now clear to the Commission is that it did not consider the implications of this rule for that sliver of traffic that may be jurisdictionally interstate but not subject to access charges as a result of prior Commission action.

The RBOCs have seized upon the Commission's conclusion that inter-carrier compensation for ISP-bound traffic is outside the scope of Section 251(b)(5) and use it to construct two arguments intended to ensure that CLECs be placed at a competitive disadvantage. First, they argue that this conclusion brings into question whether the Commission may extend the negotiation and arbitration requirements of Sections 251 and 252 to this traffic. Second, they argue that it brings into question whether CLECs may opt in under Section 252(i) to reciprocal compensation provisions that have been held to apply to ISP-bound traffic.[13]

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[12]RCN Comments at note 2.

[13]A third unstated use the ILECs seek to make of this ruling is to undermine the state commission decisions requiring reciprocal compensation for ISP-bound traffic. The ILECs predictably have seized on the portions of the Declaratory Ruling that have branded this traffic as interstate to seek to avoid paying reciprocal compensation, thereby undoing their contractual obligations to CLECs. *See, e.g., Wisconsin Bell, Inc. v. TCG Milwaukee, Inc.*, Civil Action No. 98 C 0366 C, Ameritech Wisconsin's Initial Supplemental Brief, (W.D.Wis.); *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic,* Case No. 97-C-1275, Petition of Bell Atlantic-New York to Re-Open Case 97-C-1275 (N.Y. P.S.C.). In addition, Bell Atlantic, GTE, and US West have seized on the conclusion that this traffic is outside the scope of Section 251(b)(5) to challenge the authority of state commissions even to resolve this issue. *Bell Atlantic Tel. Cos. v. FCC,* Case No. 99-1094 et al., Motion for Expedition (D.C. Cir.). Regardless of the Commission's intention to make clear that the Declaratory Ruling should not disturb the state commission decisions that have already decided the issue, the ILECs have ignored those admonitions, and have drawn CLECs back into costly litigation on issues that have already been

All of the RBOCs and GTE have made the argument that the Commission has no authority to extend the requirements imposed on ILECs by Sections 251 and 252 to ISP-bound traffic.[14] Because, they argue, the Commission has ruled that Section 251(b)(5) does not apply to this traffic, and because there is no other provision of Section 251 that would apply, the Section 251 and 252 obligations to negotiate this issue and to submit unresolved issues to state commissions for arbitration do not apply. The RBOCs are wrong. The Commission has previously ruled that Sections 251 and 252 apply to interstate as well as local traffic,[15] and inter-carrier compensation for ISP-bound traffic falls within the general terms of interconnection between local exchange carriers, and thus is governed by Sections 251 and 252, even if it does not constitute reciprocal compensation. Nevertheless, resolution of this particular issue is not necessary. Instead, the Commission should correct its error and simply rule that Section 251(b)(5) applies to this jurisdictionally interstate service.

Similarly, Ameritech and Bell Atlantic have made the argument that CLECs may not exercise their rights under Section 252(i) to opt into the terms and conditions in existing interconnection agreements that address reciprocal compensation for ISP-bound traffic (or have been found by state

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decided. The result is to add continuing uncertainty to the issue of compensation for this traffic, directly contrary to the stated intentions of Chairman Kennard. Chairman Kennard asserted on February 25,1999 that providing market certainty was a principal reason not to delay issuance of the Commission's ruling on the issue.

[14]Ameritech Comments at 15; Bell Atlantic Comments at 5; BellSouth Comments at 4; GTE Comments at 12; SBC Comments at 16; US West Comments at 12.

[15]*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶ 84 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*") .

commissions to apply to ISP-bound traffic) because they are not subject to Section 251.[16] Again, by ruling that ISP-bound traffic is subject to Section 251(b)(5) even though it is jurisdictionally interstate would resolve the matter by making the ILEC argument moot.

IV. RCN SUGGESTS A VARIATION ON ITS INITIAL PROPOSAL

In its initial Comments, RCN proposed that the Commission adopt a federal inter-carrier compensation system that mirrors the existing reciprocal compensation rules. The RCN proposal has virtues of simplicity, fairness, and established results, and should be adopted by this Commission. In light of the ILECs' position that inter-carrier compensation for ISP-bound traffic is outside the scope of Sections 251 and 252 based on the Commission's decision that Section 251(b)(5) does not apply to this traffic, RCN proposes a variation on its initial proposal. This variation avoids the issue of a state commission's authority to resolve this matter under Sections 251 and 252[17].

RCN proposes that the Commission make clear that it is establishing a rule for inter-carrier compensation for jurisdictionally interstate ISP-bound traffic under its authority under Section 201. Second, the Commission should reaffirm that ISP-bound traffic is jurisdictionally mixed and state commissions share jurisdiction with the Commission. Third, the Commission should neither preempt the state authority over this traffic, nor delegate its authority to the states. State commissions therefore retain the authority to set all compensation rates between local exchange carriers for jurisdictionally intrastate traffic, including traffic to ISPs. As explained below,

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[16]Ameritech Comments at 22; Bell Atlantic Comments at 8.

[17]As argued above, the BOCs are wrong regarding the scope of Sections 251 and 252, and this matter may be resolved by the states pursuant to their authority under Sections 251 and 252.

segregation of intrastate ISP-bound traffic is not necessary to accomplish this result. Finally, the Commission should adopt the rate set by the states applicable to the jurisdictionally intrastate portion of this traffic as the federal rate for the jurisdictionally interstate portion.

Segregation of ISP-bound traffic into intrastate and interstate jurisdictions is not necessary to establish an inter-carrier compensation rate. The only traffic under consideration here is the traffic between an end user and an ISP. A rate for the jurisdictionally intrastate portion of ISP-bound traffic should be identical to the rate for the jurisdictionally interstate portion because the costs are the same. Whether, under the Commission's jurisdictional analysis, the traffic terminates on servers in the state or outside the state is not relevant to the cost analysis -- the cost of delivering the call to the ISP, the only function to be compensated by this inter-carrier compensation system, is identical. The communications beyond the ISP that determine whether the traffic is jurisdictionally interstate or intrastate are not relevant to the issue of compensation between local exchange carriers. Compensation for the communications beyond the ISP are subject to separate agreements among ISPs and Internet backbone providers. For the purposes of determining an appropriate system of inter-carrier compensation, all of the traffic, regardless of jurisdiction, terminates at the ISP.

Accordingly, the alternative Commission rule would reflect the following: (1) the carrier serving the customer originating a call to an ISP must compensate the carrier serving the ISP; (2) the rate of compensation for the jurisdictionally interstate portion of this traffic should be the same rate of compensation between the carriers established by the state commission with jurisdiction over the intrastate portion; (3) state commissions would include intrastate ISP-bound traffic within the reciprocal compensation rate for local exchange traffic, using ILEC costs subject to the rebuttable

presumption that CLEC costs are symmetrical to ILEC costs; (4) the Commission shall retain the authority to review rates and terms of compensation for jurisdictionally interstate ISP-bound traffic.

The proposed rule takes advantage of two undeniable facts: (1) the costs, and therefore the rates of compensation, are identical for jurisdictionally interstate and intrastate ISP-bound traffic; and (2) states share jurisdiction over this jurisdictionally mixed traffic. The consequences of this rule would be continued state commission authority to set compensation rates between local exchange carriers for jurisdictionally intrastate traffic. The rule would also minimize administrative or transactional costs by having a federal inter-carrier compensation rate mirroring the state compensation rate. The Commission would retain its authority to review the compensation rate for jurisdictionally interstate traffic in the event that a carrier contends that the interstate rate should be different than the intrastate rate. The rule is sensible, simple, and could be implemented by the states very quickly.

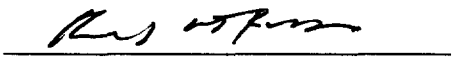
V. CONCLUSION

The comments have highlighted a number of complications resulting from the Commission's decision that compensation for ISP-bound traffic is outside the scope of Section 251(b)(5). RCN submits that this traffic is within the scope of Section 251(b)(5), and certainly within the overall scope of Section 251. By revisiting its earlier decision and determining that this traffic, consistent with the language of the Act, is within the scope of Section 251(b)(5), a host of problems would be resolved. The Commission then could establish reciprocal compensation rules applicable to all traffic, including ISP-bound traffic, and states undoubtedly would have the authority to administer the rule. The negotiation and arbitration requirements of Section 251 and 252 would clearly apply

to ISP-bound traffic (even though RCN contends that Sections 251 and 252 already apply to this traffic).

In the alternative, the Commission should adopt a variation on RCN's initial proposal. Under that variation, the Commission would establish a federal rule under Section 201 that the inter-carrier compensation rate for jurisdictionally interstate ISP-bound traffic shall be the same as the rate for jurisdictionally intrastate traffic. The intrastate compensation rate would be set by state commissions under their intrastate authority, and rate would be the same as the existing reciprocal compensation rate for all other local traffic.

Respectfully submitted,



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Dated: April 27, 1999

CERTIFICATE OF SERVICE

I, Carolyn W. Shaw, hereby certify that on this 27th day of April 1999, copies of the foregoing Reply Comments of Comments of RCN Telecom Services, Inc. were served by first-class mail, postage prepaid to the following; except as indicated:

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